UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/657
22 July 1994

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 657

Case No. 687: ARAIM

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, President; Mr. Jerome Ackerman, First Vice-President; Mr. Luis de Posadas Montero, Second Vice-President;

Whereas, on 28 August 1992, Amer Salih Araim, a staff member of the United Nations, filed an application requesting the Tribunal, inter alia:

"...to find that:

1. The Administration failed to advertise the posts of Chief of Council and Committee Services Section and of the Special Assistant to the Under-Secretary-General in the former Department of Political and Security Council Affairs (PSCA), as requested by General Assembly resolution 33/143, part I, paragraph 1(a) of 20 December 1978.

2. The Administration has failed to observe staff regulation 4.4 by filling the post of the Special Assistant to the then Under-Secretary-General of PSCA with a diplomat from the then Permanent Mission of the Soviet Union, in violation of staff rule 4.4 and PD/2/88.

3. The Office of Human Resources Management (OHRM) has once again ... [denied] him full and fair consideration for a D-1 post.

4. OHRM failed to deal with the continuing discrimination [against him]...

5. To endorse the findings of the JAB [Joint Appeals Board] Panel...

6. To award the Applicant compensation equal to two years net base salary for the injury sustained..."

Whereas the Respondent filed his answer on 20 November 1992;

Whereas the Applicant filed written observations on 12 January 1993;

Whereas, on 21 June 1994, the Applicant submitted an additional statement;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 8 August 1978, on secondment from the Government of Iraq, on a three year fixed-term appointment, as a Political Affairs Officer at the P-4 level, in the Council and Committee Services Section, Security Council and Political Committees Division, Department of Political and Security Council Affairs (PSCA). On 1 June 1981, he was reassigned to the Committee Services and Research Branch of the Centre against Apartheid, within the same department. On 8 August 1981, after the Applicant's resignation from the service of his government, his appointment was extended for three years. On 1 April 1982, he was promoted to the P-5 level, as Senior Political Affairs Officer, and became Secretary of the ad hoc Committee on the Drafting of the International Convention against Apartheid in Sports and Deputy Secretary of the Special Committee against Apartheid. On 1 May 1984, he received a probationary appointment, which was converted to a permanent appointment on 1 January 1985. The Applicant has, since then, served as Secretary to various groups and committees, and as Deputy Secretary of the Special Committee against Apartheid.

On 5 September 1991, Mr. Leonid Malyev, a national of the former USSR, who served as Chief of Council and Committee Services Section, died.

On 21 October 1991, the Under-Secretary-General, PSCA, announced to the staff of his department that Mr. Evgeniy Gorkovskiy, also a national of the former USSR, who was serving in the same department as Special Assistant to the Under-Secretary-General, PSCA, at the D-1 level, had been appointed Deputy Director of Security Council and Political Committees Division and Chief of Council and Committee Services Section, with effect from 18 October 1991.

According to the records of the Joint Appeals Board (JAB) proceedings, the lateral transfer of Mr. Evgeniy Gorkovskiy to the post of Chief of Council and Committee Services Section was effected before the departmental announcement. The post of Special Assistant to the Under-Secretary-General, PSCA, vacated by the lateral transfer of Mr. Evgeniy Gorkovskiy, was filled on 30 October 1991, by the external recruitment of another citizen of the former USSR, Mr. Rollan Dzhikiya. He was given a four month fixed-term contract, expiring on 29 February 1992.

On 8 November 1991, the Applicant requested the Secretary-General to review the administrative decision not to advertise the post of Deputy Director of the Security Council and Political Committees Division and Chief of Council and Committee Services Section and to fill it by the lateral transfer of Mr. Evgeniy Gorkovskiy. Not having received a reply from the Secretary-General, on 3 January 1992, the Applicant lodged an appeal with the JAB, requesting, under staff rule 111.2(f) "the Administration to take action on this post by annulling the above mentioned departmental instruction." On 23 January 1992, the JAB adopted its report on the request for suspension of action, which concluded as follows:

> "10. Since the action the Appellant requested be suspended had already been taken, it was not possible for the JAB to make a recommendation for suspension of action.

11. Accordingly, the Panel makes no recommendation in support of the Appellant's request under staff rule 111.2(f)."

On 7 May 1992, the JAB adopted its report on the merits of the case and concluded, in part, as follows:

"Conclusion

...

17. Although application for consideration for a post does not necessarily ensure that a staff member will be selected, denial of such opportunity must certainly extinguish any such expectation. The Administration's arguments do not negate the fact that when the post in question became available, as a result of the death of the incumbent, and taking into account past injustices for which the Appellant received damages and which the Administrative Tribunal expected the Respondent to try and correct, the Appellant should have been given an opportunity to apply for the post.

18. For the foregoing reasons the Panel recommends that:

(a) Notwithstanding the restructuring of PSCA, the Appellant be afforded the opportunity to apply for whatever D-1 level posts are currently available or may become available in the Department of Political Affairs;

(b) That the Appellant be awarded $7,500 as damages for the new injury suffered."

On 16 June 1992, the Assistant Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed him as follows:

"The Secretary-General has re-examined your case in the light of the Board's report. He has noted that Judgement No. 533 calls for you to receive the same fair treatment as other staff members are entitled to. He is firmly committed to ensure that you will receive the full and fair consideration to which you are entitled for any vacant D-1 post for which you are qualified.

The Secretary-General wishes to re-affirm that, with respect to the post under appeal as well as with respect to any other post, programme managers have the delegated authority under staff regulation 1.2 to rotate or transfer

staff laterally within their departments or offices, without prior consideration of each of the staff members at a lower level who might have relevant qualifications and experience. It is only after the appropriate lateral transfers have been made within the department or office that unfilled posts are considered vacant and may be advertised under the applicable procedures, if the decision is made to fill them.

As the D-1 post subject to appeal was filled laterally within the department, it never became a vacant post for which staff members at the P-5 level would have had the right to be considered. The Secretary-General, therefore, is unable to agree with the Board's conclusion that your rights were violated because you were not considered for the post, and he must reject the Board's recommendations since they are based on that conclusion.

The Secretary-General, however, is deeply concerned by your perception that you have been and continue to be the victim of discrimination in the Organization. He has decided to constitute a panel which will investigate your claims."

On 28 August 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Administration failed to advertise the post of Chief of Council and Committee Services Section, as required by General Assembly resolution 33/143 of December 1978.

2. Internal staff were not considered for the filling of the post of Special Assistant to the Under-Secretary-General, PSCA, even though, for a short temporary period, someone else filled that post.

3. The Administration has failed to deal with the continuing discrimination to which the Applicant is subjected.

Whereas the Respondent's principal contentions are:

1. Programme managers have authority to rotate or transfer staff laterally within their departments or offices. The Applicant's rights were not violated by the lateral transfer of another staff member.

2. The fact that a post is not filled pending a restructuring of the Secretariat does not violate the Applicant's rights.

The Tribunal, having deliberated from 21 June to 22 July 1994, now pronounces the following judgement:

I. In the several cases brought by the Applicant before the Tribunal three recurrent themes are prominent:

(a) He was allegedly denied promotion through the filling of vacancies without advertising them, contrary to the requirements of the relevant Staff Rules or General Assembly resolutions;

(b) The Applicant was allegedly never given full and fair consideration for vacancies that occurred from time to time, in spite of the Respondent's assurance that he would do so, following the recommendations of the JAB on different occasions and the Tribunal's Judgement No. 533; and

(c) The Applicant, along with some others, were allegedly subject to discrimination because of their ethnic origin.

The first two issues are closely related.

II. As regards the allegation of discrimination, the Respondent claims that, in the present case, this issue was not before the JAB and is therefore not within the purview of the Tribunal under article 7 of its Statute. The Tribunal notes, however, that the question of discrimination was earlier discussed at length. Whatever might be the feeling and perception of the Applicant on this matter, the Tribunal has not found specific evidence of any discrimination against him. The Applicant may feel that he has been, in one way or another, a victim of discrimination, since the Persian Gulf War. However, he has provided no proof of such discrimination.

III. The Applicant's specific complaints in the present case are (1) that when Mr. Malyev (a citizen of the former USSR), the incumbent of the D-1 post of Chief of Council and Committee Services Section died, the Respondent denied the Applicant an opportunity to be considered for the vacant post by filling it through the lateral transfer of another Soviet staff member who was then serving as Special Assistant to the Under-Secretary-General, Department of Political and Security Council Affairs, and (2) that the Respondent, by filling through external recruitment the Special Assistant post thus vacated, denied the Applicant an opportunity to be considered for it.

The Tribunal notes that although the claims relate to two posts, in reality only one vacancy might have been available to be filled by the Applicant. If the Deputy Director post had not been filled by lateral transfer of the Special Assistant, the Special Assistant post would not have become vacant. It was only because of the lateral transfer that the Special Assistant post was open.

IV. The Respondent claims that under the prevailing Vacancy Management System, the lateral transfer of a staff member at the D-1 level was within the discretion of the Under-Secretary-General in charge of the department. The Tribunal does not question this right, which is provided for in administrative instruction ST/AI/338. The Applicant, however, was not at the D-1 level. He was at the P-5 level and therefore was not eligible for a lateral transfer to the D-1 post. As it was not contemplated, at that time, that the D-1 Deputy Director post was to be, in the circumstances, filled by a promotion, the Tribunal does not consider that the Applicant has standing to challenge the lateral transfer, and the Tribunal need not consider the merits of this issue further.

V. The Tribunal notes further that the Special Assistant vacancy, resulting from the lateral transfer, was temporarily filled for a brief four-month period by a citizen of the former USSR, who was then a member of the Permanent Mission of the USSR to the United

Nations. Although subsequently, the latter post was redesignated and filled by staff members of other nationalities, the Tribunal finds, from the absence of any substantial reason for external recruitment and a pattern of filling certain posts in the department, that the Respondent had decided in advance to give priority consideration to a Soviet citizen to the exclusion of others. The Tribunal was faced with a somewhat similar situation in Judgement No. 310, Estabial (1983) and held that this constituted unfair treatment in that the Applicant did not receive the consideration to which he was entitled for the vacancy.

VI. With respect to the filling of the vacancy of the Special Assistant post, not only is the Tribunal's jurisprudence in Estabial applicable for the reasons indicated above, but the Applicant was also entitled to be considered for the post under PD/2/88, paragraph 2, which provides that "Special Assistants will be selected from among staff members", not by external recruitment. The Tribunal finds, as noted above, that the filling of the Special Assistant post by an external candidate, who was a Soviet citizen, stemmed predominantly from a determination to accord preferential treatment to a Soviet citizen, which is in conflict with the Tribunal's jurisprudence in Estabial.

VII. The only explanation given was that the four-month period "coincides with the current ... term of all Under-Secretaries-General, including myself: ... the appointment of a new Secretary-General (expected in January 1992) may give rise to certain changes in his cabinet of senior officials. In the light of this probability, I considered it appropriate that the selection of a candidate for the post should be postponed." This explanation, although understandable, is not acceptable as it does not state why this temporary appointment had to go to a citizen of the former USSR. In addition, as noted above, the failure to advertise the post and fill it, even temporarily, with a staff member was in violation of Personnel Directive PD/2/88, paragraph 2.

VIII. The Tribunal holds, therefore, that the Applicant was wrongly denied the opportunity to be considered for the D-1 post of Special Assistant, and that the responsibility of the Organization is thus engaged. The Tribunal finds no merit in the Respondent's contention, in a parallel case, that Personnel Directive PD/2/88 is inapplicable to short term temporary appointments. The unambiguous language of the provision contains no such qualification.

IX. The Tribunal also finds that while many of the arguments made by the Applicant to the Respondent are repetitious, it would have been more satisfactory if his letters had been attended to in a proper and timely manner by the Administration. Many of the letters addressed by the Applicant to various administrative officials were not answered at all or were disposed of in a dilatory, if not cavalier, way. The filling of the posts was apparently decided upon in a manner that lent an air of casualness which could and should have been avoided. The Tribunal is left with the impression that the Applicant's pleas and requests were lightly dismissed and not given the attention which they deserved.

X. The Tribunal concludes that in the procedure and the process followed in this case, the interests of the Applicant were not fully protected and he is therefore entitled to some compensation. However, the Tribunal also considers that, in the circumstances of this case, which, as noted above, actually involved one vacancy, there was, without doubt, a possibility that the number of D-1 posts would be reduced in the reorganized department and, accordingly, the chances of the Applicant to obtain a promotion would be reduced, even if he were found to be qualified for such an advancement. Also, as a practical matter, the Tribunal realizes that there is some justification for temporarily filling a post for four months without any vacancy announcement. The Tribunal recalls that the Applicant is entitled to consideration for promotion to any vacant post for which he applies and is qualified.

XI. In view of the considerations set forth above, the Tribunal orders that:

1. The Respondent pay to the Applicant the amount of U$2,000.00;

2. The Applicant be considered fully and fairly for any D-1 post that may become vacant for which he applies and is found to be qualified;

3. All other pleas of the Applicant are rejected.

(Signatures)

Samar SEN
President

Jerome ACKERMAN
First Vice-President

Luis de POSADAS MONTERO
Second Vice-President

Geneva, 22 July 1994

R. Maria VICIEN MILBUNR
Executive Secretary